U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

Issue date: 11Jun2002

Case No.: **2001-LHC-0291**

OWCP No.: **1-144473**

In the Matter Of:

RONALD K. HARGRAVES
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

and

Director, Office of Workers' Compensation Programs, U.S. Department of Labor
Party-in-Interest

APPEARANCES:

Scott N. Roberts, Esq.
For the Claimant

Michael J. Feeney, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
For the Director

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on February 29, 2002 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an

exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
EX 30A	Attorney Feeney's status letter	03/28/02
CX 10	Claimant's brief	04/24/02
EX 31	Attorney Feeney's letter filing	04/24/02
EX 32	Employer's brief	04/24/02

The record was closed on April 24, 2002 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On July 24, 1998, Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on October 4, 2000.

7. The applicable average weekly wage is $1,160.52 producing a compensation rate of $773.68. (EX 10)

8. The Employer voluntarily and without an award has paid temporary total compensation from March 3, 1999 through August 29, 2000, and partial disability benefits thereafter at the weekly rate of $542. 21. All medical expenses have been paid.

The unresolved issue in this proceeding is the nature and

extent of Claimant's disability.

Summary of the Evidence

Ronald K. Hargraves ("Claimant" herein), forty-six (46) years of age and with an employment history of manual labor, began working on June 14, 1982 as a chipper/grinder at the Groton, Connecticut shipyard of the Electric boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As a chipper/grinder Claimant daily used various pneumatic or air-powered vibratory tools to perform his assigned maritime duties. In 1989 he transferred to work as a painter and he used various types of paints, chemicals and solvents to perform his assigned tasks. In 1992 he started using Mare Island paint. Claimant began to experience nasal congestion, chest tightness and pulmonary problems, and he was referred to the Occupational Health Clinic at the Yale New haven Hospital in 1998. The diagnosis was occupational asthma and a sensitivity to chemicals in the work environment, work restrictions were imposed and Claimant gave these restrictions to appropriate personnel at the Yard Hospital. (TR 20-22)

In early 1999 he began to experience bilateral hand/arm tingling, numbness and aching, and he was referred to Dr. Wainright for an evaluation of those symptoms. Claimant underwent a left carpal tunnel release in March of 1999 and a right carpal tunnel release the following month. The Employer was unable to provide suitable employment within Claimant's orthopedic and respiratory/pulmonary restrictions (CX 3) and he was put out on disability compensation status. He was laid-off on December 7, 1998. (CX 2) He was finally terminated on January 5, 2000, as he had been out on compensation for eighteen (19) consecutive months, a termination that is permitted by the Employer's collective bargaining agreement (C.B.A.). He has looked for work but no one will hire him because of his multiple medical problems and his work restrictions. (CX 3) As his entire employment history has been that of manual labor, he would like to be retrained for other work that he can perform within his restrictions. Most of the jobs listed by the Employer in its labor market surveys (EX 26, EX 27) exceed his work restrictions and he is willing to take any job to support himself. (TR 22-25)

The record reflects that the Employer referred Claimant to the OHC for evaluation of his vitiligo (**i.e.**, depigmentation of the skin) and chemical sensitivity. Dr. Kathryn L. Johnson, the Employer's Medical Director, has opined that these conditions **are work-related**. (CX 4A) According to the OHC report, "Ronald Hargraves was evaluated at the Yale Occupational Health Clinic (on July 23, 1998). He has a sensitivity to the paints and solvents

used during his daily routine and should be allowed to perform duties that don't require painting or use of solvents." (CX 9A) The Employer placed those restrictions in Claimant's medical file. (CX 6)[1] I note that Claimant reported his vitiligo to the Employer on May 2, 1995. (CX 5)

Dr. William A. Wainright, an orthopedic and hand surgeon, examined Claimant on September 22, 1998 for evaluation of "numbness in both hands." Initial testing led the doctor to suspect bilateral "carpal tunnel syndrome with element of proximal forearm as well as thoracic outlet compression." The doctor opined that the "condition is work-related" and he "start(ed) him on conservative therapy including anti-inflammatory medication and physical therapy." However, the symptoms persisted and Dr. Wainright performed a left carpal tunnel release on March 3, 1999 and a right carpal tunnel release on April 28, 1999. (EX 15) Dr. Wainright kept Claimant out of work and he referred Claimant for an evaluation by Dr. Anthony G. Alessi and the doctor sent the following letter to Dr. Wainright on August 23, 1999 (EX 14):

"It was my pleasure to see Ronald Hargraves in consultation today. As you know Mr. Hargraves is a 43-year-old right handed black male who presents with a chief complaint of numbness and tingling in his hands. His symptoms are worse in the left hand. He has been working as a painter at Electric Boat for the past 10 years. While working there he does use vibratory tools in the form of grinders and sanders. He reports that he does have symptoms at night and when driving a car. He has weakness in the left hand. Wrist splint of the left hand has been helpful.

"He is on no medications at the present time.

"Past medical history is unremarkable.

"GENERAL PHYSICAL EXAMINATION: Shows a well-developed, well-nourished 43-year-old black male in no acute distress.

"NEUROLOGIC EXAM...

"Based on my evaluation of Mr. Hargraves, it is my feeling that he is suffering from bilateral median neuropathies consistent with carpal tunnel syndrome. I am going to see him back again only on an as needed basis. He will be following up in your office. Thanks again for referring him," according to the doctor.

As of June 21, 2000, Dr. Alessi reported as follows (EX 14 at 2):

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[1]I note that the diagnosis of "vertigo" is clearly erroneous. (CX 6)

"It was my pleasure to see Mr. Hargraves once again today. As you know he is a 44-year-old black male employed at Electric Boat. I last had the pleasure of seeing him in August 1999 for what was found to be bilateral carpal tunnel syndrome. Prior to that he had had surgical intervention under your care. He never had actual improvement and actually since last August has not noted any improvement. He has not noted any deterioration in the function of his hands. The numbness continues to be primarily in the median distribution of both hands. He does have a history of exposure to vibratory tools that was previously noted as being 10 years of exposure but was more likely 17 years based on different occupations at Electric Boat. He does have asthma and uses an inhaler. His symptoms are worse in the left hand...

"NEUROLOGIC EXAM...

"Based on my evaluation of Mr. Hargraves his electrical studies did not show any change from the previous study in August. Essentially he does have evidence of bilateral median neuropathy but no evidence of peripheral polyneuropathy. I think this addresses the issue as to whether or not patients who have had injury due to vibratory tool trauma will have improvement of the electrical studies and whether or not their symptoms will improve. I spoke with Mr. Hargraves and the importance of the surgery is to provide some assurance that his symptoms would not worsen and indeed they have not. He is going to follow up in your office. Thanks again for referring him," according to the doctor.

Dr. Martin Hasenfeld examined Claimant on July 20, 1999 and issued the following report (EX 16):

"HISTORY OF PRESENT ILLNESS:

This is an Independent Medical Examination (sic) for a 43 year old black male painter at Electric Boat who last worked at Electric Boat on 12/18/98. He worked There for 16 years. The patient did have a history of using vibratory tools, as well as repetitive activities. He reports the date of injury as 6/1/98, as an accumulation of injuries over time. No specific incident occurred.

"REVIEW OF RECORDS:

The accident date was noted in the chart as 7/22/98 as repetitive trauma, documented by Dr. Wainwright. Dr. Wainwright initially saw the patient on 9/22/98 and documented numbness in both bands, left greater than tight. He had nighttime paresthesias and morning stiffness. The patient had most pain in the index, middle and ring linger bilaterally. There was positive Tinel's and Phalen's. Positive thoracic outlet stressing on the right. The patient was

given anti-inflammatories and physical therapy. A return visit on 1/8/99 showed increasing pain in the left elbow area with continued numbness. X-ray of the elbow showed multiple bony loose bodies. Impression was degenerative joint disease, multiple loose bodies, left elbow; continued carpal tunnel syndrome.

Physical therapy notes document range of motion exercises, first rib gliding, phonophoresis, lateral epicondyle given an elbow strap, pbcnophoresis to The bilateral carpal tunnels, neuro glides of the bilateral upper extremities. Thoracic outlet exercises, corner stretches. CT of 1/26/99 of the left elbow documented post-traumatic changes involving predominantly medial epicondyle and humeral ulnar joint at The ollecranon. Serology showed an increased sedementation rate of 12 and a positive ANA with a speckled pattern and a titer 1:80 dilution.

Dr. Wainwright performed Neuropace electrode neuromotor latency evaluation on 2/5/99. This was suggestive of multiple areas of peripheral entrapment, superimposed on possible peripheral neuropathy. Follow up on 3/1/99 and documents discussion of left carpal tunnel release and left elbow injection.

Operative note of 3/3/99 documents release of left carpal tunnel, release of distal antebrachial fascial left arm. Injection of Celestone. left elbow. Follow up on 3/11/99 was within normal limits. Follow up on 4/5/99 prepared for release of the right carpal tunnel. Operation on 4/28/99 documents carpal tunnel right wrist release of distal antebrachial fascia, right forearm cortisone injection of left elbow with I and ½ cc of Celestone.

Follow up from 5/6/99 documents the two cortisone injections have not helped him.

On 5/27/99 he started a course of physical Therapy. Physical therapy noted right intrinsic wasting, left middle finger and intrinsic weakness, cervical range of motion with limited flexion, rotation tightness. The patient had painful end feel at cervical motions. Pain on a scale of S at rest, 6-7 at the elbow and, it is at its worst in the hands at night.

Past history is also significant for a chemical burn in 1990 which has led him to have headaches, bloody nose and sore throat. He sees Dr. Bertman, his primary care physician.

In reference to the hand pain, he is having pain with opening of soda bottles that wakes him at night...

1. Is treatment appropriate, palliative or curative?

   The surgical releases has (sic) not not changed the patient's pain. Further work up is needed.

2. What is your recommended course of treatment?

EMG/NCS and/or imaging study of the cervical spine is warranted.

Pending the outcome of those evaluations, the patient may need to be placed on non-steroidal anti-inflammatory medications, muscle relaxants and/or other pain management medications.

3. Does this claimant have a work capacity at This time?
Yes, I believe that he does.

If he cannot return to full function your modified work restrictions would be appreciated in order to place him back to work.

I believe that the patient can use his lower extremities easily. Very easy′use of the upper extremities with light lifting as well as occasional rests and no repetitive use of the upper extremities would be warranted. I believe That it may be temporary in nature. A further workup may show pathology That could be resolved in order to get this patient back to a higher level of function.

4. Are there any pre-existing conditions that would materially or substantially increase this individual′s disability?

It has been shown on serologic evaluation that the patient does have an increased sedementation rate and positive ANA with positive speckled pattern at 1:80. The speckled pattern is most commonly seen in mixed connective tissue diseases. Such a disease could be a pre-existing condition and materially and substantially increase this individual′s disability.

5. In your opinion, do you believe that this claimant′s symptomatology complaints of a bilateral carpal tunnel syndrome are causally and fully related to the reported date of injury on 6/1/98? At this particular time, it does not appear that the patient has significant relief from bilateral carpal tunnel release to answer this question as there may be other pathology involved in this case and a further review after workup may give more details to clarify the work-relatedness of this claim," according to the doctor.

Dr. H. Kirk Watson, an orthopedic, plastic and hand surgeon, examined Claimant on August 16, 1999 and the doctor issued the following **CONFIRMATORY CONSULTATION** (EX 17):

"This 43-year-old right dominant male has worked as a painter at EB for 17 years. I gather he was laid off in December 1998, but has

been receiving worker's compensation benefits (?). In September of that year he sought medical attention for bilateral hand symptoms of numbness and tingling, present for many years and slowly progressive in severity. It is his recollection that the middle ring and little fingers were most profoundly effected(sic). He acknowledges a significant nocturnal component. Preoperative nerve paste testing was apparently remarkable for bother median and ulnar conduction delays at both wrist and elbow levels. Though the possibility of a generalized peripheral neuropathy was entertained, the patient was nonetheless taken to surgery for left (03-99) and right (04-99) carpal tunnel releases using a open technique. Though surgery on the left initially seemed to help, within several weeks the patient reports that his symptoms recurred and at this time they are no better than when he started. He noted very little change at all on the right.

At this time he describes fairly consistent numbness and tingling in the tips of thumb, middle, ring and little fingers bilaterally; predictably worse at night. He denies significant pain. Though he describes finger 'coldness', there is no history of pallor or other color changes.

I gather he has been scheduled for formal neurodiagnostic testing in the coming week. Recently acknowledged neck problems are to be evaluated by an Orthopaedic Surgeon.

"**PAST MEDICAL HISTORY, REVIEW OF SYSTEMS**: Generally in excellent health. Allergies-none. Medications-none. The patient denies relevant systemic conditions as well as significant prior hand injuries or complaints.

"**X-RAY**: None provided.

"**ASSESSMENT**: The patient presents with a convincing history of peripheral neuropathy; initial nerve paste testing as well as his failure to respond significantly to carpal tunnel release would suggest that this may not represent an entrapment neuropathy, but rather a more generalized phenomenon. His work at EB raises the possibility of chemical exposures, as well as vibration phenomenon etc.

I would concur that formal neurologic evaluation is essential including comprehensive neurodiagnostic testing.

"**DISPOSITION**: Clinical findings, impressions and recommendations were reviewed briefly with the patient," according to the doctor.

Dr. Wainright sent the following letter on September 30, 1999 to the Employer's workers' compensation adjusting firm (EX 15 at 11):

“At your request, I have reviewed the IME (sic) done by Dr. Hasenfeld concerning Ronald Hargraves. Overall, I am in agreement with Dr. Hasenfeld′s evaluation. This is an unusual case and is not the routine carpal tunnel syndrome/vibratory white finger pathology.

“Unfortunately, recent nerve conduction studies by Dr. Alessi in August of 1999 showed only carpal tunnel syndrome. At this point, I′d recommend he be referred to a cervical spine specialist such as Dr. Michael Halperin in Norwich for evaluation and treatment of his cervical spine,” according to the doctor.

Dr. Wainright continued to see Claimant as needed between January 27, 2000 and October 23, 2000, at which time the doctor reported (EX 15):

“He returns for evaluation. Overall he is doing about the same. His main complaint remains numbness in the left hand. He feels that after his right carpal tunnel release there initially was no improvement in his numbness, but now this has considerably improved as the months have gone by. His left carpa] tunnel release, unfortunately, has not improved his symptoms at all. The numbness mainly involves the left thumb.

“On examination there is a positive Tinel′s sign over the course of the median nerve in the carpal tunnel, and over the surgical incision area. Phalen′s test, however, is negative at 60 seconds. Thoracic outlet stressing does reproduce pain and numbness in the hand.

“Cervical spine range of motion reproduces no radicular signs today.

“Impression: Continued numbness after carpal tunnel release.

“Repeat nerve testing shows no worsening of his symptoms, and I do not feel he is a candidate for any further surgery at the carpal tunnel level. Phalen′s test is negative today, indicating lack of entrapment of the median nerve at the wrist level. His continued numbness in the left thumb is of questionably etiology. His main physical finding remains positive thoraeic outlet entrapment findings.

“His cervical spine has been evaluated by Dr. Mike Halperin who does not feel he has a major cervical radiculopathy either. He has seen Dr. Ashmead for a second opinion in the past, who felt he had a peripheral polyneuropathy, but this has not been supported with the subsequent nerve conduction studies.

“Impression: Status post bilateral carpal tunnel releases. Thankfully, the patient has had symptomatic improvement on the

right side, but unfortunately, not the left.

“Regarding his carpal tunnels only, he does have a 5% impairment of each hand. I would recommend he have permanent work restrictions and avoid the use of air-powered vibrating tools. I would like him to have vascular studies performed as well to investigate the possibility of vascular involvement with hand/arm vibration syndrome,” according to the doctor.

The record also contains the July 27, 2000 report of Dr. Louis V. Buckley, a pulmonary specialist, wherein the doctor states as follows (EX 22 at 1-2):

“I had the pleasure of seeing Ronald Hargraves, L&M file #M0187622, on several occasions in my office. The patient is a pleasant 44-year-old black male who was seen previously in the Occupational Health Clinic at Yale and has been a long-standing grinder and then painter at EB. He began-having problems with his breathing more recently; at about the time that Mare Island paint was introduced into the work environment. The patient was laid off about fifteen months ago because of a work slow down

“The patient, because of his asthenic build, was a tank painter, utilizing Mare Island paint in close environments. About 1990, he started noticing problems with hypopigmentation of his skin, itching and rash. In 1996 and 1997, he noticed exhaustion, chest tightness, chest pain, rapid heart beating, wheezing usually during and several hours after his shift. This occurred almost seven days a week and did not appear to be relieved particularly by removal from the work environment during vacations or time off, etc. Since that time, the patient has continued to have occasional cough, sputum production, and wheezing and chest tightness.

“He is a lifetime non-smoker, except for a brief period during high school. He was not in the service. His parents and siblings are alive and well, without a history of asthma. He played basketball in high school for four years successfully. In the past he was a runner, but more recently has only been able to run a quarter of a mile before stopping due to chest symptomatology.

“He takes no chronic medications, has no chronic chest complaints. He is seen by Dr Gary Bertman in routine medical follow-up.

“Significant physical examination reveals an asthenic black male in no acute distress. 02 saturation was 96%. Lungs were clear at this time. Cardiac examination is normal. Abdominal examination benign. Extremities without clubbing, cyanosis or edema.

“Pulmonary function studies were accomplished on April 6th, which showed essentially normal flow rates, without significant bronchodilator response. Borderline low lung volumes and mild

decrease in diffusing capacity, 71% of predicted. The patient underwent a methacholine challenge test. It showed hyperreactivity at 150 dose units, compatible with a diagnosis of asthma or reactive airways disease.

"I have suggested to the patient that he start on Albuterol two puffs four times a day as needed and Azmacort, six puffs twice a day to reduce airway inflammation.

"I think the patient is without a pre-existing history of asthma, lung disease or specific lung irritants. He did work as a grinder and then in a closed environment of submarines, especially tank painting. His symptomatology, by history, began at the time, apparently when Mare Island paint was introduced into the work environment. The patient does have objective evidence of airway hyperreactivity, but has otherwise rather well-maintained pulmonary functions.

"At this time, I think return to epoxy paint application in very close spaces would provide the patient with likelihood of developing increase in his reactive airways disease. The patient could return to painting in non-closed environments and non-epoxy paint applications, but obviously this would be a significant change form his prior work description. I am concerned that the patient will probably continue to have increased respiratory symptoms should he return to his previous work environment. Hopefully, some satisfactory alternate work description could be found for this patient. His pulmonary function at this time is reasonably good," according to the doctor.

If you have any questions, feel free to contact me.

As of September 21, 2000 Dr. Buckley reported as follows (Ex 22 at 3):

"Since last being seen, Mr. Hargraves has had occasional wheezing which has been slightly problematic. He continues to take his bronchodilator inhalers b.i.d. I suggested to him that he add Singulair to his current regimen to see if can control his wheezing better.

"He has not received any compensation for the last two months. I have suggested that he contact his lawyer and provided him with copies of letters to Murphy & Beane and his pulmonary function test and his methacholine challenge test.

"We will see him again in about two to three months' time. He will contact me in two weeks' time to report his progress on the Singulair," according to the doctor.

As of December 4, 2000 Dr. Buckley reported as follows (EX 22 at 4):

“IMPRESSION: Asthma with mild continued activity.

“PLAN: Add Pulmicort two puffs b.i.d. Continue Serevent two puffs twice a day and Singulair 10 mg once a day and pm Albuterol.

“HISTORY: Since last being seen, Mr. Hargraves has had increasing respiratory difficulties, especially early in the morning, with chest tightness centrally which can persist through the day. There is slight improvement with the use of Albuterol, not much improvement with Serevent. He has had some improvement with Singulair.

The patient, on physical examination today, showed minimal expiratory wheezing. Normal cardiac examination. Negative extremities.

In summary, the patient is a 44 year-old man with Methacholine challenge test proven mild hyperreactive airways who appears to have some exacerbation of his reactive airways disease, especially with early morning chest tightness. Will place the patient on the Pulmicort and assess his progress in two weeks′ time. Plan to see him again in three months′ time. Consideration to use of a proton pump inhibitor on the outside chance that this chest tightness is an alternative diagnosis to consider. Likewise, the possibility of a stress test is raised, although the clinical circumstance and duration of chest tightness, etc. and the clinical characteristics are not likely to be coronary disease,” according to the doctor.

As of January 20, 2001 Dr. Buckley reported as follows (EX 22 at 5):

“Since last being seen, Mr. Hargraves has done better with the addition of Pulmicort to his current regimen. He currently takes Singulair 10 mg once a day, Pulmicort two puffs twice a day, Serevent two puffs twice a day and, as needed, Albuterol. He has minimal early morning wheezing, otherwise feels reasonably well.

“He is not yet back to work in any capacity. I suggested that he needs to talk with his union or with his employer to try and activate the process. I do think he could be gainfully employed, but I do not think that epoxy paint exposure or epoxy exposure would be a safe endeavor for him. **He needs to be either retrained for another occupation or find a more safe setting for him to practice in.** The patient understands this and will endeavor. I will try and eradicate the last vestiges of his wheezing by increasing his Pulmicort to three puffs twice a day, continue his other medications as previously prescribed. (Emphasis added)

“His lungs were clear at this time. His oxygen saturation was His cardiac examination normal. Extremities without clubbing, cyanosis or edema.

“IMPRESSION: Stable.

“PLAN: The patient will be seen in three months′ time, sooner if difficulties arise,” according to the doctor.

As of April 23, 2001 Dr. Buckley reported as follows (EX 22 at 6):

“Since last being seen Mr. Hargraves has done quite well. Happily he is going to return to work, as a tool crib attendant. This is quite encouraging and should be well tolerated by him.

“At the present time his asthma is under control. He is taking Singulair 10 mg once a day, Pulmicort 2 puffs twice a day, Serevent 2 puffs twice a day and rarely Albuterol. His wheezing has been well-controlled. He does have some excessive mucous secretions first thing in the morning. I have suggested to him, on a trial basis, we increase his Pulmicort to 2 puffs twice a day to see if that will reduce the lung inflammation and mucous hypersecretion.

“I am very pleased that he will be returning to work as a tool crib attendant. I think that is an excellent placement for him and he should be able to carry out that job well.

“I plan to see him again in three months time to assess whether we can reduce his medication program. His lungs were clear today. His 02 saturation was 98%. His blood pressure was 120/80. The remainder of his physical examination was unremarkable.

“IMPRESSION: Asthma stable.

“PLAN: The patient will be seen in three months time to attempt to reduce his medications to about 50/50,” according to the doctor.

Dr. Buckley reiterated his opinions at his October 10, 2001 deposition, the transcript of which is in evidence as EX 23.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v.**

Todd Shipyard Corp., 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shifts the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out

of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that the employee's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his bilateral hand/arm problems and his occupational asthma, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22

BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant's bilateral carpal tunnel syndrome has resulted from his daily use of pneumatic vibratory tools in the performance of his maritime duties, that his occupational asthma has resulted from his daily exposure to and inhalation of paint, paint fumes, chemicals and solvents in the performance of his assigned shipyard duties, that the Employer had timely notice of such injuries, has authorized appropriate medical care and treatment and has paid certain compensation benefits to Claimant, that the Employer reduced those benefits based upon its labor market survey and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established he cannot return to work at the shipyard. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did submit probative and persuasive evidence as to the availability of suitable alternate employment as further discussed below. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d

1327 (9th Cir. 1980). I therefore find Claimant has a total disability until the date of the Employer's second labor market survey.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be

introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on July 24, 2001 and that he has been permanently and partially disabled from July 25, 2001, according to the well-reasoned opinion of Ms. Corneau, as further discussed below.

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

With reference to Claimant’s residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger’s Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General**

Dynamics Corp., 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

Claimant concedes that he has a post-injury wage-earning capacity, that he has learned how to live with and cope with his bilateral hand and chemical sensitivity restrictions. While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

The Employer has offered the August 18, 2000 Labor Market Survey of Jessica Corneau, MA, CRC, wherein Ms. Corneau states that there are suitable alternate jobs available for Claimant as a security guard, as a receptionist and as a parking-lot attendant at various companies she identifies. (EX 26)

However, I reject that Labor Market Survey **as it is based solely on Claimant's "physical restrictions" relating to his bilateral hand/arm problems and does not take into account Claimant's occupational asthma and the pulmonary/respiratory restrictions imposed by Dr. Buckley on or about July 11, 2000.** (CX 3A)

This Administrative Law Judge, in rejecting that Labor Market Survey, initially notes that Ms. Corneau only reviewed the following documents given to her by Employer's counsel. (EX 26 at 1)

FILE INFORMATION REVIEWED:
Claim Report, 6/1/98
Lost Time Report
Initial Vocational Assessment, Cherie King
CRC, CDMS, ABVE, 7/16/99
Notes to File, General Dynamics Workers' Compensation System, 1/5/00
Vocational Rehabilitation Report, Sandra Mackler, M.Ed., CRC, CBMS, 1/5/00
Notes, Dr. Wainright, 7/11/00, 5/1/00, 1/27/00
Report Dr. Halperin, 2/1/00
Work Restrictions Form, Dr. Halperin, 2/1/00
Confirmatory Consultation Report, Hartford Orthopaedic, Plastic and Hands Surgeons, Inc., 8/16/99
IME Report, Dr. Hasenfeld, 7/20/99
Deposition of Ronald Hargraves, 4/26/99

Ms. Corneau concludes as follows on page 4 of her report (EX 26 at 4):

Based on the research conducted, it is demonstrated that there are jobs for which Mr. Hargraves is qualified, and which fit WITHIN HIS PHYSICAL RESTRICTIONS. (Emphasis added.)

Thus, as can be readily seen, Ms. Corneau does not refer to Claimant's occupational asthma or to any of the reports of Dr. Buckley, the earliest of which is the doctor's pulmonary/respiratory restrictions (CX 3) received by the Employer on July 13, 2000 (EX 3), five weeks before the Labor Market Survey of Ms. Corneau. (EX 26)

However, the Employer, recognizing the deficiencies of that report, has provided the Updated Labor Market Survey of Ms. Corneau wherein, as of July 24, 2001, she reports as follows (EX 27):

REFERRAL REQUEST: This file was referred to Concentra Managed Care, Inc. for an update of the labor market survey performed August 18, 2000. Upon receipt of the referral, I contacted Attorney Michael Feeney, and went to his office on 7/16/01 to review Mr. Hargraves' recent deposition and additional medical information.

FILE INFORMATION REVIEWED:
The following information was reviewed prior to conducting this labor market research (Items noted with dates in bold are newly reviewed since the date of the original labor market survey.):

Claim Report, 6/1/98
Lost Time Report
Initial Vocational Assessment, Cherie King, CRC, CDMS, ABVE, 7/16/99
Notes to File, General Dynamics Workers Compensation System, 1/5/00
Vocational Rehabilitation Report, Sandra Mackler, M.Ed., CRC, CBMS, 1/5/00
Notes, Dr. Wainwright, 7/11/00, 5/1/00, 1/27/00, 10/23/00
Report, Dr. Halperin, 2/1/00
Work Restrictions Form, Dr. Halperin, 2/1/00
Confirmatory Consultation Report, Hartford Orthopaedic, Plastic and Hands Surgeons, Inc., 8/16/99
IME Report, Dr. Hasenfeld, 7/20/99
Deposition of Ronald Hargraves, 4/26/99, 7/5/01
Office Notes, Louis Buckley, M.D., 9/21/00
Notes, Yale Occupational & Environmental Medicine, 7/23/98
Correspondence to David Bull, Esq., Dr. Buckley, 7/7/00
Correspondence to Ronald Hargraves, Kalman Watsky, M.D.
Correspondence to Ronald Hargraves, Daniella Duke, M.D.

SIGNIFICANT INFORMATION:
Pre-Injury Position: Painter
Diagnosis: Hand/Arm Injury; Chemical Sensitivity

File information reviewed indicates that Mr. Graves (sic) was

employed as a Painter at General Dynamics' Electric Boat Division in Groton, Connecticut, at the time of his injury on June 1, 1998. He had been working as a Painter for approximately eight years, and prior to that was employed at Electric Boat as a Chipper/Grinder for seven years.

Following a diagnosis of bilateral carpal tunnel syndrome, he underwent surgical carpal tunnel releases for both wrists, the left on 3/3/99 and the right on 4/27/99. Dr. Hasenfeld indicates that Mr. Hargraves can now easily use his lower extremities, but with restrictions on his upper extremities. He restricts Mr. Graves to "very easy use of the upper extremities with light lifting as well as occasional rests, and no repetitive use of the upper extremities." Dr. Wainwright has indicated that Mr. Hargraves should be permanently restricted from the use of air-powered and/or vibratory tools. In his recent deposition, Mr. Hargraves indicates that he believes his lifting restriction to be no greater than 25 pounds.

In addition to the restrictions resulting from Mr. Hargraves' carpal tunnel syndrome, he also reports that he was splashed with a chemical solvent, Unisol, while at work in 1990. Since that time, he has had some respiratory and chemical sensitivity, and has a reaction when working near paint and other chemicals. Recent medical records indicate that he has been diagnosed with Vitiligo/Chemical Sensitivity, and that he should not be exposed to vapors, fumes, or dust in his working environment. Additionally, in these reports there is mention of Mr. Hargraves having asthma, and the fact that he utilizes inhalers.

VOCATIONAL INFORMATION:

Various resources were utilized to identify transferable skills, salary ranges, and employment demands. Included were the following:

The Dictionary of Occupational Titles, U.S. Dept. of Labor
The Enhanced Occupational Outlook Handbook, U.S. Dept. of Labor (compiled by J.M. Farr, L.Ludden, and P. Margin)
The Revised Handbook for Analyzing Jobs, U.S. Dept of Labor
Classification of Jobs 2000, J. Field & I. Field
The Guide to Occupational Exploration, U.S. Dept. of Labor, Edited by J.M. Farr
Various Websites: America's Job Bank, Career Infonet, various job search sites

JOB HISTORY:

Title	Painter, Shipyard	DOT Code	840.381-018	GOE	05.10.07
Chipper/Grinder		809.684-026		06.04.24	

SVP	GED	Strength
3	R2 M1 L1	Heavy
7	R3 M2 L2	Medium

According to the **Dictionary of Occupational Titles**, Mr. Hargraves job as a Chipper/Grinder was heavy in nature, requiring frequent lifting of up to 50 pounds, and occasional lifting of up to 100 pounds. His job as a Painter was medium in nature, requiring frequent lifting of up to 25 pounds, and occasional lifting of up to 50 pounds.

EDUCATION: High School Graduate

ADDITIONAL RELEVANT INFORMATION: Mr. Hargraves states in his deposition that he possesses a current drivers' license and is able to drive.

TSA/CAREER OPTIONS:
Using the VDARE process, transferable skills were identified (including Specific Vocational Preparation, General Educational Development, Aptitudes, Physical Demands, Environmental Conditions, Temperaments, and General Education Development). They are as follows:

Specific Vocational Preparation (SVP): 7 (Over 2 years and up to and including 4 years). This is considered to be work of a skilled nature.

General Educational Development:

Reasoning: Level 3: Apply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form. Deal with problems involving several concrete variables in or from standardized situations.
Math: Level 2: Add, subtract, multiply, and divide all units of measure.
Language: Level 2: Passive vocabulary of 5,000-6,000 words. Read stories and comic books. Write compound and complex sentences. Speak clearly and distinctly with appropriate pauses and emphasis.
Aptitudes: Mr. Hargraves demonstrated an average or above average aptitude in the following areas:
General Learning Ability, Verbal Aptitude, Numerical Aptitude, Spatial Aptitude, Form Perception, Motor Coordination, Finger Dexterity, Manual Dexterity, Eye-Hand-Foot Coordination, Color Discrimination

Temperaments: Attaining Tolerances (including precise sets limits and standards), Making Judgements

Interest Areas: 05 Mechanical, 06 - Industrial

Based upon Mr. Hargraves' skills, his educational level, and his physical abilities as outlined in the medical reports reviewed, the following occupational alternatives are feasible, and jobs within these occupations have been identified in Mr. Hargraves' local labor market:

Title	DOT Code	GOE	SVP	GED	Strength
Security Guard	372-667-034	04.02.02	3	R3 M1 L2	Light
Sales Clerk	290.477-014	09.04.02	2	R3 M2 L2	Light
Information Clerk	237.367-022	07.04.04	4	R4 M2 L3	Sedentary

The occupation Information Clerk listed above is the closest match to a Bus Greeter listed in the **Dictionary of Occupational Titles**, however the requirements listed in the description are more involved than those of a Bus Greeter. Additionally, one job was identified for which there was no description in the DOT. It was a Sitter, and the details are listed below.

Research was conducted between 7/17/01 and 7/24/01, utilizing classified advertisements, internet resources, and direct employer contacts regarding possible jobs. The jobs identified as appropriate and available to Mr. Hargraves are within a 30-mile commuting distance from his home are as follows:

CONTACTS:

1. Employer Name:	Ace Security (Visit)
Address:	567 Vauxhall Street, #301, Waterford, CT
Contact:	Tom Lombardo, Assistant Director
Location of Jobs:	Throughout Southeastern and Central Connecticut
Position:	Full time and Part time Security Guards (Unarmed); Traffic Safety Officers
Salary:	Mr. Lombardo did not wish to discuss this. Prior to contact, however, has indicated that the positions pay $6.75-9.00 per hour (1998) equivalent of $624.8.33 per hour)
Skills Required:	No experience required. Will train. Must

Job Duties, Incl. Travel:	have no felony convictions.
Do Duties Meet Claimant's Physical Restrictions?	Yes. Mr. Lombardo indicates that they make every attempt to match an individual to a position within that individual's physical capacities.
2. Employer Name:	Pinkerton Security (Telephone contact)
Address:	East Hartford, CT
Contact:	Kim (most recently)/Larry Goldfarb, Recruiter
Location of Jobs:	Local in the Groton, New London, and Norwich areas
Position:	Full time and Part-time Security Guards
Salary:	$8.50 per hour (1998) equivalent 7.86 per hour)
Skills Required:	No experience required. Will train. Must have a high school diploma and be able to pass a criminal background check.
Job Duties, Incl. Travel:	Provide property surveillance and protective services for local businesses.
Do Duties Meet Claimant's Physical Restrictions?	Yes.
Comments:	They have a variety of positions available. Some of these are primarily in a seated position, with the option to stand as comfort dictates, and other involve some walking to make rounds.
3. Employer Name:	Blackstone Valley Security (Prior visit, ongoing telephone contact)
Address:	Providence, RI
Contact:	Gregory Church, Partner
Location of Job:	Throughout Rhode Island
Position:	FT and PT Security Guards
Salary:	$6.50-11.00 per hour (1998 equivalent $5.79-9.80 per hour)
Skills Required:	No experience required, will train. Must be flexible about hours, and be able to pass a criminal background check.
Job Duties, Incl. Travel:	Provide property surveillance and/or monitor people/customers entering or leaving property. Many drive a surveillance vehicle if licenced.
Do Duties Meet Claimant's Physical Restriction?	Yes
Comments:	Mr. Church emphasized that the company will try to match a candidate with a job, in order to accommodate physical restrictions. He emphasized that they are a reporting agency only, and that their guards contact the police and fire department, rather than handling emergencies themselves, unless it is a life or death situation.
4. Employer Name:	Foxwoods Resort Casino (Visit)

Address:	Route 2, Mashantucket, CT
Contact:	Sam Agnello, Recruiter
Location of Job:	Same
Position:	Full time Bus Greeter
Salary:	$8.75 per hour (1998 equivalent $7.80 per hour)
Skills Required:	No experience required, will train. High school diploma or GED preferred. Basic computer knowledge or typing skills preferred.
Job Duties, Incl. Travel:	Inform guests regarding events and attractions, schedules and departure times
Do Duties Meet Claimant's Physical Restrictions?	Yes
Comments:	Employees in this job work in an enclosed booth and outside.

5. Employer Name:	Foxwoods Resort Casino (Visit)
Address:	Route 2, Mashantucket, CT
Contact:	Sam Agnello, Recruiter
Location of Job:	Same
Position:	Full time Retail Associate
Salary:	$8.75 per hour (1998 equivalent $7.80 per hour)
Skills Required:	No experience required, will train. High school diploma or GED preferred. Must be
Job Duties, Incl. Travel:	able to stand/walk for long periods of time, and have good close vision. Able to bend, lift, and carry up to 25 pounds.
Do Duties Meet Claimant's Physical Restrictions?	Yes
Comments:	The retail stores are enclosed individually within the casino.

6. Employer Name:	U.S. Securities (Telephone contact)
Address:	Worcester, MA and Wauregan, CT
Contact:	Wilfred Blake, Supervisor (CT office)
Location of Job:	Throughout Northeastern Connecticut, and Central/Eastern Massachusetts
Position:	FT and PT Security Guards
Salary:	$8.00-12.00 per hour (1998 equivalent $7.13-10.69 per hour)
Skills Required:	No experience required, will train. Must be able to pass a criminal background check.
Job Duties, Incl. Travel:	Provide property surveillance and/or monitor people/customers entering or leaving property. May work in a booth overseeing a trailer yard, and log trucks in and out.
Do Duties Meet Claimant's Physical Restrictions?	Yes.
Comments:	

7. Employer Name:	William Backus Hospital (Visit)
Address:	Washington Street, Norwich, CT
Contact:	LaTonya Wilmer, Human Resources Staffing Assistant
Location of Job:	Same
Position:	PT (24 or 32 hours) Sitter
Salary:	$8.87 per hour (1998 equivalent $7.90 per hour)
Skills Required:	High school diploma or equivalent required. Experience or education in psychology or social services preferred.
Job Duties, Incl. Travel:	Stay with and observe patients that are suicidal or at risk for causing themselves harm (i.e., pulling out IV's or wandering away)
Do Duties Meet Claimant's Physical Restrictions?	Yes
Comments:	Ms. Wilmer indicates that there is no lifting involved, and that sitters can either sit or stand as they feel comfortable. If there is an emergency, they are to push a call button for security. Benefits are available at 20 permanent hours with Backus Hospital.

Based on the research conducted, it is demonstrated that there are jobs for which Mr. Hargraves is qualified, and which fit within his physical restrictions. This determination is made based upon information obtained from employers, the **Dictionary of Occupational Titles**, and the Classification of Jobs. This information demonstrates that there are vocational opportunities in his local labor market that could return Mr. Hargraves to gainful employment at $6.50-12.00 per hour or $260-480 per week for a 40-hour work week (1998 equivalent $232-428 per week).

Thank you for the opportunity to provide this information, if I can be of further assistance, please don't hesitate to contact me.

I agree completely with Christopher Tolsdorf, Ph.D, who conducted a psycho-educational evaluation of the Claimant on December 8, 1999 and who concluded as follows in his report (EX 29):

DISCUSSION:

Mr. Hargraves is an individual with fairly narrow work experience. Formal testing indicates that his cognitive skills are below average and are not sufficient for him to be able to benefit from any type of educational or training program requiring an average degree of conceptualization or intellectual ability. He is best suited for learning basic manual tasks in an on-the-job training setting. His strengths are in his interpersonal skills, and he comes across as pleasant, friendly, and fairly easy to talk to.

Thus he may do well in some form of hospitality, recreating, or tourist trade. He would also be suitable for work as a security guard, sales clerk, or in any semi-skilled factory or assembly position. His weaknesses in reading in writing as well as in math should preclude him from working in the any area involving computers, or any job that would require a high degree of documentation or writing.

As indicated above, the Respondents have offered Labor Market Surveys (EX 26 and EX 27) in an attempt to show the availability of work for Claimant as a security guard and a retail sales associates and bus greeter, as well as a hospital sitter. I accept the results of that more thorough and second survey which consisted of the counsellor making a number of telephone calls to prospective employers and then visiting these employers to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

I am cognizant of the fact that the controlling law is somewhat different on the employer's burden in the territory of the First Circuit when faced with a claim for permanent total disability benefits. In **Air America, Inc. v. Director, OWCP**, 597 F.2d 773, 10 BRBS 490 (1st Cir. 1978), the United States Court of Appeals for the First Circuit held that it will not impose upon the employer the burden of proving the existence of actual available jobs when it is "obvious" that there are available jobs that someone of Claimant's age, education and experience could do. The Court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden had to be lowered to meet the reality of the situation. In **Air America**, the Court held that the testimony of an educated pilot, who could no longer fly, that he received vague job offers, established that he was not permanently disabled. **Air America**, 597 F.2d at 778, 780, 108 BRBS at 511-512, 514. Likewise, a young intelligent man was held to be not unemployable in **Argonaut Insurance Co. v. Director, OWCP**, 646 F.2d 710, 13 BRBS 297 (1st

Cir. 1981).

In the case **sub judice**, the parties are in agreement that Claimant is, in fact, employable and that he has been gainfully employed for the period of time summarized above, but the parties are in disagreement as to Claimant's post-injury wage-earning capacity. Thus, in my judgment, **Air America**, **supra**, and **Argonaut Insurance Co.**, **supra**, are distinguishable as involving claims for total disability benefits.

In view of the foregoing, I accept the results of the second Labor Market Survey because I conclude that certain of those jobs constitute, as a matter of fact or law, **suitable** alternate employment or **realistic** job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Accordingly, I find and conclude that Claimant has a residual wage-earning capacity to work forty (40) hours per week, that the Employer has established a post-injury hourly rate of $7.84 after adjusting for inflation for the jobs that I have identified as suitable alternate employment for Claimant within his orthopedic and pulmonary/respiratory restrictions, that Claimant has a post-injury wage-earning capacity of $313.60 (**i.e.**, 40 hours x $7.80 per hour =) and that an appropriate order will be entered herein.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd**

on other grounds, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. The Employer did accept the claim and did authorize such medical care.

As I have found and concluded that Claimant's bilateral hand/arm problems and his occupational asthma are work-related

injuries, the Employer shall continue to authorize and pay for the reasonable, necessary and appropriate medical care and treatment relating to such medical conditions, subject to the provisions of Section 7 of the Act.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits to the Claimant and timely controverted entitlement to benefits at a higher weekly level. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a

self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after October 4, 2000, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and Employer's counsel shall have fourteen (14) days to file a response thereto. Claimant's counsel is directed to file that survey of attorneys' hourly rates in Connecticut as compiled by Altman & Weill.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from March 3, 1999 through July 24, 2001, based upon an average weekly wage of $1,160.52, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Employer shall pay to Claimant compensation for his permanent partial disability, based upon the difference between his average weekly wage at the time of the injury, $1,160.52, and his wage-earning capacity after the injury, $313.60, as provided by Sections 8(c)(21) and 8(h) of the Act.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his July 24, 1998 injury.

4. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer shall continue to furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related orthopedic and pulmonary/respiratory injuries referenced herein may require, subject to the provisions of Section 7 of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel

who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on October 4, 2000.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl